



# *COMMONWEALTH of VIRGINIA*

## *DEPARTMENT OF ENVIRONMENTAL QUALITY*

### TIDEWATER REGIONAL OFFICE

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Molly Joseph Ward  
Secretary of Natural Resources

David K. Paylor  
Director

Craig R. Nicol  
Regional Director

## **STATE WATER CONTROL BOARD ENFORCEMENT ACTION - ORDER BY CONSENT ISSUED TO The City of Norfolk FOR**

### **The Western Branch Dam Safety Improvements Project VWPP Permit No. 10-1859**

#### **SECTION A: Purpose**

This is a Consent Order issued under the authority of Va. Code § 62.1-44.15, between the State Water Control Board and the City of Norfolk, regarding the Western Branch Dam Safety Improvements project, for the purpose of resolving certain violations of State Water Control Law and the applicable permit and regulations.

#### **SECTION B: Definitions**

Unless the context clearly indicates otherwise, the following words and terms have the meaning assigned to them below:

1. "Board" means the State Water Control Board, a permanent citizens' board of the Commonwealth of Virginia, as described in Va. Code §§ 10.1-1184 and 62.1-44.7.
2. "Department" or "DEQ" means the Department of Environmental Quality, an agency of the Commonwealth of Virginia, as described in Va. Code § 10.1-1183.
3. "Director" means the Director of the Department of Environmental Quality, as described in Va. Code § 10.1-1185.
4. "Impacts" means results caused by those activities specified in § 62.1-44.15:20 A of the Code of Virginia.

5. "Norfolk" means the City of Norfolk, a political subdivision of the Commonwealth of Virginia. Norfolk is a "person" within the meaning of Va. Code § 62.1-44.3.
6. "Notice of Violation" or "NOV" means a type of Notice of Alleged Violation under Va. Code § 62.1-44.15.
7. "Order" means this document, also known as a "Consent Order" or "Order by Consent," a type of Special Order under the State Water Control Law.
8. "Permit" or "Virginia Water Protection Permit" means an individual or general permit issued under Va. Code § 62.1-44.15:20 that authorizes activities otherwise unlawful under Va. Code § 62.1-44.5 or otherwise serves as the Commonwealth's certification under § 401 of the federal Clean Water Act (33 United States Code ("USC") § 1344.
9. "Pollutant" means any substance, radioactive material, or heat which causes or contributes to, or may cause or contribute to pollution. 9 VAC 25-210-10.
10. "Pollution" means such alteration of the physical, chemical or biological properties of any state waters as will or is likely to create a nuisance or render such waters: (i) harmful or detrimental or injurious to the public health, safety or welfare, or to the health of animals, fish or aquatic life; (ii) unsuitable with reasonable treatment for use as present or possible future sources of public water supply; or (iii) unsuitable for recreational, commercial, industrial, agricultural, or other reasonable uses; provided that (a) an alteration of the physical, chemical, or biological property of state waters, or a discharge or deposit of sewage, industrial wastes or other wastes to state waters by any owner which by itself is not sufficient to cause pollution, but which, in combination with such alteration of or discharge or deposit to state waters by other owners is sufficient to cause pollution; (b) the discharge of untreated sewage by any owner into state waters; and (c) contributing to the contravention of standards of water quality duly established by the board, are "pollution." Va. Code § 62.1-44.3; 9 VAC 25-210-10.
11. "Regulations" means the Virginia Water Protection Permit Program Regulations, 9 VAC 25-210 *et seq.*
12. "Restoration" means the reestablishment of a wetland or other aquatic resource in an area where it previously existed. Wetland restoration means the reestablishment of wetland hydrology and vegetation in an area where a wetland previously existed.
13. "Significant alteration or degradation of existing wetland acreage or function" means human-induced activities that cause either a diminution of the areal extent of the existing wetland or cause a change in wetland community type resulting in the loss or more than minimal degradation of its existing ecological functions. 9 VAC 25-210-10.
14. "Site" means the tract of land located at Lockwood Circle along Route 58 and Route 10/32, in Suffolk, Virginia, owned by Norfolk.

15. "State Water Control Law" means Chapter 3.1 (§ 62.1-44.2 *et seq.*) of Title 62.1 of the Va. Code. Article 2.2 (Va. Code §§ 62.1-44.15:20 through 62.1-44.15:23) of the State Water Control Law addresses the Virginia Water Resources and Wetlands Protection Program.
16. "State waters" means all water, on the surface and under the ground, wholly or partially within or bordering the Commonwealth or within its jurisdiction, including wetlands. Va. Code § 62.1-44.3 and 9 VAC 25-210-10.
17. "Surface water" means all state waters that are not ground waters as defined in Va. Code § 62.1-255.
18. "TRO" means DEQ's Tidewater Regional Office located in Virginia Beach, Virginia.
19. "Va. Code" means the Code of Virginia (1950), as amended.
20. "VAC" means the Virginia Administrative Code.
21. "Wetlands" means those areas that are inundated or saturated by surface or groundwater at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas. 9 VAC 25-210-10.

#### **SECTION C: Findings of Fact and Conclusions of Law**

1. Norfolk owns and operates the Western Branch Dam Safety Improvements construction Site located in Suffolk, Virginia. The Site is the subject of the Virginia Water Protection Individual Permit, which DEQ issued to Norfolk on September 26, 2011 and which expired on September 26, 2016. The Permit authorized Norfolk to impact surface waters, including wetlands, associated with the Site project.
2. On February 4, 2015, May 22, 2015, and June 11, 2015, Department staff inspected the Site for compliance with the requirements of the Permit, State Water Control Law, and the Regulations. During inspections on these days, DEQ observed the following:
  - a. Construction conformance plans presented at a pre-construction meeting on February 4, 2015, and present onsite after construction commenced, identified unauthorized impacts to wetlands that had not been approved in the Permit. On May 22, 2015, DEQ observed two rows of silt fencing located channelward of stakes labeled "wetlands" near the toe of the new emergency spillway in Area 10A. Norfolk had removed vegetation and filled in unauthorized wetland areas between the "wetland" stakes and the two silt fences. Unauthorized impacts to Area 10A totaled 0.233 acres of emergent wetlands.

- b. A review of DEQ files did not find notification of unauthorized impacts or a request for change of impacts to wetlands in this area.
  - c. On June 11, 2015, DEQ observed that two pumping equipment and a dewatering basin comprised of stone and hay bales were located in Area 10A between the aforementioned two lines of silt fencing in non-tidal wetlands. A review of the Permit indicated that an impact to wetlands in this area was not authorized.
  - d. On May 22, 2015 and June 11, 2015, DEQ observed that sediment was running into the non-tidal wetlands channelward of the silt fencing. Additionally, dewatering discharges from the Site were running across unstabilized soils and into non-tidal wetlands through holes in both lines of silt fencing. Norfolk had not maintained portions of the silt fence properly in this area, as evidenced by tears in the silt fencing and areas of silt fencing overburdened with sediment.
  - e. A review of DEQ files did not find that Norfolk had submitted a final construction plan for review and approval, a notification of construction, or a construction monitoring report for the first quarter of 2015.
- 3. Part I.C.13 of the Permit requires that the Permittee avoid or minimize temporary disturbances to wetlands, stream channels, and/or stream banks during project construction activities.
  - 4. Part I.C.18 of the Permit requires that the Permittee implement and maintain proper erosion and sediment controls to minimize impacts to surface waters.
  - 5. Part I.C.25 of the Permit requires that the Permittee notify DEQ of any additional impacts to surface waters, including wetlands, and of any change to the type of surface water impacts.
  - 6. Part I.D.7 of the Permit requires that the Permittee perform all work in surface waters downstream of an existing dam spillway in the dry behind a temporary cofferdam.
  - 7. Part I.E.2 of the Permit requires that the Permittee submit to DEQ final plans for the project construction activities within 30 calendar days prior to initiating any land disturbance or construction in the permitted impact areas.
  - 8. Part I.E.3 of the Permit requires that the Permittee perform construction in accordance with the final construction plans, which shall be in compliance with the Permit.
  - 9. Part I.E.4 of the Permit requires that the Permittee submit written notification at least 10 calendar days prior to the initiation of land disturbance or construction activities in impact areas.
  - 10. Part I.E.8 of the Permit requires that the Permittee submit Construction Monitoring Reports quarterly and by the 10<sup>th</sup> calendar day of the month following each quarter.

11. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 states that except in compliance with a VWP permit, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters or otherwise alter the physical, chemical, or biological properties of state waters.
12. On June 24, 2015, DEQ issued an NOV for violating the Permit, Va. Code § 62.1-44.15:20, and 9 VAC 25-210-50.
13. On February 8, 2016, Norfolk responded to the NOV, and raised a number of arguments as to why they believed some of the alleged violations cited in the NOV had not occurred.
14. On February 24, 2017, March 17, 2017, and March 30, 2017, Department staff inspected the Site to reassess conditions identified in the June 24, 2015 NOV and compliance with the requirements of the Permit, State Water Control Law, and the Regulations. During inspections on these dates, DEQ observed the following:
  - a. Unauthorized impacts to wetlands channelward of the spillway in Area 10A. The wetlands in this area remained in a disturbed state with areas of sediment deposition, fill, and absent or sparse vegetation.
  - b. On February 24, 2017, DEQ observed wetland Areas 9A and 9B (located north of the existing spillway).
    - i. Forested non-tidal wetlands in Area 9A, representing 0.002-acres, had unauthorized impacts.
    - ii. Area 9A was not properly identified or flagged to prevent these impacts, nor was DEQ notified of these impacts.
    - iii. A temporary sediment trap/silt bag was present in Area 9B.
    - iv. Area 9B was not properly identified or flagged to prevent these impacts, nor was DEQ notified of these impacts.
  - c. On February 24, 2017, DEQ observed that the turbidity curtain channelward of the permitted Impact Areas 2A-1, 2a-2, 2A-3, and 2-B had been removed even though the area's soils were not adequately stabilized.
  - d. On March 30, 2017, DEQ observed that the cofferdam had been removed even though work was continuing downstream. The Permit requires that all work in surface waters downstream of the existing dam spillway be performed in the dry behind temporary cofferdams.
15. Part I.B of the Permit requires that the Permittee extend the Permit term or obtain a new permit for the continuance of authorized impacts or any permit requirement that has not been completed, including compensation provisions.

16. Part I.C.18 of the Permit requires that the Permittee implement and maintain proper erosion and sediment controls to minimize impacts to surface waters.
17. Part I.C.19 of the Permit requires that the Permittee flag or demarcate wetlands within 50 feet of project activities sufficiently to prevent impacts.
18. Part I.C.25 of the Permit requires that the Permittee notify DEQ of any additional impacts to surface waters, including wetlands. Any additional impacts or changes shall be subject to Permit review or modification, and compensation may be required.
19. Part I.D.7 of the Permit requires that the Permittee install turbidity curtains downstream of authorized work areas prior to initiation of work, and properly maintain these curtains until all work in these areas has been completed and stabilize.
20. Part II.Q of the Permit states that except in compliance with the Permit, it shall be unlawful for the Permittee to fill, permanently flood, or conduct new activities in a wetland that cause significant degradation of existing wetland acreage and function, or to otherwise alter the physical, chemical, or biological properties of state waters.
21. Part II.R of the Permit requires that any Permittee with an effective VWP permit for an activity that is expected to continue after the expiration date of the Permit, without any change in the activity authorized by the Permit, submit written notification requesting an extension, and file the request prior to the expiration date of the Permit.
22. Va. Code § 62.1-44.15:20 and the Regulations at 9 VAC 25-210-50 states that except in compliance with a VWP permit, no person shall dredge, fill, or discharge any pollutant into, or adjacent to surface waters or otherwise alter the physical, chemical, or biological properties of state waters.
23. Based on the results of the February 4, 2015, May 22, 2015, and June 11, 2015, and the February 24, 2017, March 17, 2017, and March 30, 2017 inspections, the Board concludes that Norfolk has violated Permit Conditions I.B, I.C.13, I.C.18, I.C.19, I.C.25, I.D.7, I.E.2, I.E.3, I.E.4, I.E.8, II.A, II.Q, and II.R, Va. Code § 62.1-44.15:20, and 9 VAC 25-210-50, as described in paragraphs C(2) through C(22), above.
24. In order for Norfolk to return to compliance, DEQ staff and representatives of Norfolk have agreed to the Schedule of Compliance, which is incorporated as Appendix A of this Order.

#### **SECTION D: Agreement and Order**

Accordingly, by virtue of the authority granted it in Va. Code §§ 62.1-44.15, the Board orders Norfolk, and Norfolk agrees to:

1. Perform the actions described in Appendix A of this Order; and

2. Pay a civil charge of \$28,770.00 within 30 days of the effective date of the Order in settlement of the violations cited in this Order.

Payment shall be made by check, certified check, money order or cashier's check payable to the "Treasurer of Virginia," and delivered to:

Receipts Control  
Department of Environmental Quality  
Post Office Box 1104  
Richmond, Virginia 23218

Norfolk shall include its Federal Employer Identification Number (FEIN) 54-6001455 with the civil charge payment and shall indicate that the payment is being made in accordance with the requirements of this Order for deposit into the Virginia Environmental Emergency Response Fund (VEERF). If the Department has to refer collection of moneys due under this Order to the Department of Law, Norfolk shall be liable for attorneys' fees of 30% of the amount outstanding.

#### **SECTION E: Administrative Provisions**

1. The Board may modify, rewrite, or amend this Order with the consent of Norfolk for good cause shown by Norfolk, or on its own motion pursuant to the Administrative Process Act, Va. Code § 2.2-4000 *et seq.*, after notice and opportunity to be heard.
2. This Order addresses and resolves only those violations specifically identified in Section C of this Order and in the June 24, 2015 NOV. This Order shall not preclude the Board or the Director from taking any action authorized by law, including but not limited to: (1) taking any action authorized by law regarding any additional, subsequent, or subsequently discovered violations; (2) seeking subsequent remediation of the facility; or (3) taking subsequent action to enforce the Order.
3. For purposes of this Order and subsequent actions with respect to this Order only, Norfolk admits the jurisdictional allegations, findings of fact, and conclusions of law contained herein.
4. Norfolk consents to venue in the Circuit Court of the City of Richmond for any civil action taken to enforce the terms of this Order.
5. Norfolk declares it has received fair and due process under the Administrative Process Act and the State Water Control Law and it waives the right to any hearing or other administrative proceeding authorized or required by law or regulation, and to any judicial review of any issue of fact or law contained herein. Nothing herein shall be construed as a waiver of the right to any administrative proceeding for, or to judicial review of, any action taken by the Board to modify, rewrite, amend, or enforce this Order.

6. Failure by Norfolk to comply with any of the terms of this Order shall constitute a violation of an order of the Board. Nothing herein shall waive the initiation of appropriate enforcement actions or the issuance of additional orders as appropriate by the Board or the Director as a result of such violations. Nothing herein shall affect appropriate enforcement actions by any other federal, state, or local regulatory authority.
7. If any provision of this Order is found to be unenforceable for any reason, the remainder of the Order shall remain in full force and effect.
8. Norfolk shall be responsible for failure to comply with any of the terms and conditions of this Order unless compliance is made impossible by earthquake, flood, other acts of God, war, strike, or such other unforeseeable circumstances beyond its control and not due to a lack of good faith or diligence on its part. Norfolk shall demonstrate that such circumstances were beyond its control and not due to a lack of good faith or diligence on its part. Norfolk shall notify the DEQ Regional Director verbally within 24 hours and in writing within three business days when circumstances are anticipated to occur, are occurring, or have occurred that may delay compliance or cause noncompliance with any requirement of the Order. Such notice shall set forth:
  - a. the reasons for the delay or noncompliance;
  - b. the projected duration of any such delay or noncompliance;
  - c. the measures taken and to be taken to prevent or minimize such delay or noncompliance; and
  - d. the timetable by which such measures will be implemented and the date full compliance will be achieved.

Failure to so notify the Regional Director verbally within 24 hours and in writing within three business days, of learning of any condition above, which the parties intend to assert will result in the impossibility of compliance, shall constitute a waiver of any claim to inability to comply with a requirement of this Order.

9. This Order is binding on the parties hereto and any successors in interest, designees and assigns, jointly and severally.
10. This Order shall become effective upon execution by both the Director or his designee and Norfolk. Nevertheless, Norfolk agrees to be bound by any compliance date which precedes the effective date of this Order.
11. This Order shall continue in effect until:
  - a. The Director or his designee terminates the Order after Norfolk has completed all of the requirements of the Order;

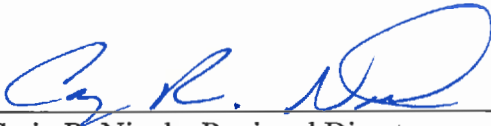


- b. Norfolk petitions the Director or his designee to terminate the Order after it has completed all of the requirements of the Order and the Director or his designee approves the termination of the Order; or
- c. the Director or Board terminates the Order in his or its sole discretion upon 30 days' written notice to Norfolk.

Termination of this Order, or any obligation imposed in this Order, shall not operate to relieve Norfolk from its obligation to comply with any statute, regulation, permit condition, other order, certificate, certification, standard, or requirement otherwise applicable.

- 12. Any plans, reports, schedules or specifications attached hereto or submitted by Norfolk and approved by the Department pursuant to this Order are incorporated into this Order. Any non-compliance with such approved documents shall be considered a violation of this Order.
- 13. The undersigned representative of Norfolk certifies that he or she is a responsible official authorized to enter into the terms and conditions of this Order and to execute and legally bind Norfolk to this document. Any documents to be submitted pursuant to this Order shall also be submitted by a responsible official of Norfolk.
- 14. This Order constitutes the entire agreement and understanding of the parties concerning settlement of the violations identified in Section C of this Order, and there are no representations, warranties, covenants, terms or conditions agreed upon between the parties other than those expressed in this Order.
- 15. By its signature below, Norfolk voluntarily agrees to the issuance of this Order.

And it is so ORDERED this 30<sup>TH</sup> day of NOVEMBER, 2017.

  
Craig R. Nicols, Regional Director  
Department of Environmental Quality

The City of Norfolk voluntarily agrees to the issuance of this Order.

Date: 9-25-17 By: Douglas L. Smith, City Manager  
(Person) (Title)  
The City of Norfolk

Commonwealth of Virginia  
City/County of Norfolk

The foregoing document was signed and acknowledged before me this 25<sup>th</sup> day of September, 2017, by Douglas L. Smith who is City Manager of the City of Norfolk, on behalf of the City.

Shelley Harris Baker  
Notary Public

7112688  
Registration No.

My commission expires: 6/30/19

Content approved:

Krist M. Lee  
Director of Utilities

Notary seal:



Approved as to form and correctness:

G. B. Hall  
Deputy City Attorney

## **APPENDIX A SCHEDULE OF COMPLIANCE**

Norfolk shall:

1. Within 30 days of the effective date of this Order, Norfolk shall submit an approvable Corrective Action Plan (CAP) for the restoration/compensatory mitigation of state waters at the Site in Areas 9A and 10A that have been impacted without a Permit that meets the requirements of 9 VAC 25-210-116. The CAP must be sufficient to achieve no net loss of existing wetland acreage and no net loss of functions in all surface waters in accordance with 9 VAC 25-210-116. Norfolk shall respond to any DEQ Notice of Deficiency regarding the CAP within 14 calendar days.
2. Upon DEQ approval of the CAP, Norfolk shall within 60 days begin implementation of the CAP in accordance with the schedule contained therein. Any changes to the approved final CAP or schedule shall not be initiated without advance notice to and approval by DEQ. Norfolk shall complete the CAP in accordance with its terms.
  - a. If the performance criteria specified in the Final CAP are not achieved at the end of the applicable monitoring period, then Norfolk shall so advise DEQ in the applicable monitoring report for that monitoring period and shall describe why it appears the criteria could not be achieved. If DEQ thereafter so directs, Norfolk shall submit to DEQ for review and approval an alternative CAP within 60 days of DEQ's letter requiring the same. The DEQ-approved alternative CAP shall then be implemented by Norfolk in accordance with the schedule set forth in the alternative CAP.
  - b. If the performance criteria specified in the Final CAP or any alternative CAP are not achieved by the end of the last monitoring period and DEQ determines that additional corrective action cannot sufficiently address the reasons for such failures, then Norfolk shall submit to DEQ for review and approval, within 30 days of such determination, a proposal to purchase mitigation bank credits or contributions to an in-lieu fee fund to address any remaining corrective action required in the Final CAP or, as applicable, any previously submitted alternate CAP. Norfolk shall respond to any DEQ notice of deficiency to the proposal in accordance with the terms of the notice. Norfolk shall purchase mitigation bank credits or make contributions to an in-lieu fund, as approved by DEQ in accordance with this paragraph, within 30 days of DEQ approval.
3. Unless otherwise specified in this Order, Norfolk shall submit all requirements of Appendix A of this Order to:

Regional Director  
VA DEQ – TRO Regional Office  
5636 Southern Blvd.

Virginia Beach, VA 23462